1993

State of Utah v. Billy Price : Brief of Appellant

Utah Court of Appeals

Attorney General\'s office; Attorney for Respondent.
Ronald W. Perkins.

IN THE COURT OF APPEALS

IN THE STATE OF UTAH

STATE OF UTAH,	/	
Plaintiff and Appellee	/	
vs.	/	Priority No. 02
BILLY PRICE,	/	Court of Appeals No. 930605-CA
Defendant and Appellant	/	Priority No.

BRIEF OF APPELLANT

THIS IS AN APPEAL FROM A VERDICT OF GUILTY RENDERED IN THE SECOND JUDICAL DISTRICT COURT IN AND WEBER COUNTY, STATE OF UTAH, ON THE DAY OF MAY, 1992, RENDERED BY JURY VERDICT BEFORE THE HONORABLE STANTON M. TAYLOR, DISTRICT COURT JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authority

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JURISDICTION

JURISDICTION TO HEAR THE ABOVE ENTITLED APPEAL IS CONFERRED UPON THE UTAH COURT OF APPEALS PURSUANT TO U.C.A. §78-2-2(3)(i)( ), 1953 AS AMENDED.

STATEMENT OF THE ISSUES ON APPEAL AND STANDARD OF APPELLATE REVIEW

1. Did the lower court commit error in failing to recognize the existence of a conflict when reappointing Attorney Laker and appointing Attorney Froerer of the Public Defender Association, of Weber County, Inc. to represent the defendant.

2. Was the representation of counsel, ineffective counsel as defined by case law and did such actions effectively constitute a violation of defendant/appellant's Sixth Amendment right to counsel.

3. Did the failure of the Public Defender Association's attorneys to secure or even attempt to secure an investigator in

this capital homicide case result in a failure to have effective counsel present an adequate defense.

The Standard of Review

A Sixth Amendment claim grounded upon a conflict of interest claim requires the defendant make a showing that a conflict exists and actual prejudice need not be demonstrated in such cases while ineffective counsel claims are usually a mixed question of law and fact which are so basic to a fair trial that its infraction can never be treated as harmless error.

DETERMINATIVE CONSTITUTION, AND PROVISIONS, STATUES AND RULES

The Sixth Amendment to the United States Constitution and Rule 1.10 of the Rules of Professional Conduct.

STATEMENT OF THE CASE

This is an appeal from a verdict of guilty of a first degree felony, criminal homicide, in the Second Judicial District Court in and for Weber County, State of Utah on the 9th day of March, 1993 heard by a jury with the Honorable Stanton M. Taylor, District Court Judge Presiding.

The defendant was sentenced on April 5, 1993 upon his conviction for criminal homicide to a term in the Utah State Prison of five (5) years and which may be for life enhanced by an additional 0 - 5 years for the use of a firearm in commission of the offense, to be served at the Utah State Prison. In addition, after the jury returned its verdict, defendant entered a guilty plea to a

charge of Possession of a Firearm by Restricted Person, a third degree felony, with the Court sentence to run concurrent with the sentence for criminal homicide.

On May 3, 1993, the defendant, through Stephen A. Laker of the Public Defender Association, Inc. of Weber County, filed a Notice of Appeal of all convictions wherein notice was filed with the Clerk of the Court of the Second Judicial District Court in and for the County of Weber, State of Utah.

The appeal was originally docketed in the Supreme Court of the State of Utah, but the Utah Supreme Court assigned same to the Court of Appeals by letter dated September 21, 1993.

Attorney Laker of the Public Defender Association of Weber County, Inc. filed a brief on behalf of the defendant on November 3, 1993.

Two days later, on November 5, 1993, the defendant/appellant filed a pro se motion requesting substitute counsel due to conflict of interest and ineffective counsel.

After Attorney Laker filed a motion to withdraw, this proceeding was remanded to the Second District Court whereat Attorney Laker was permitted to withdraw and private counsel, as opposed to a member of the Public Defender Association of Weber County, Inc., was appointed to assert defendant' s claims of conflict of interest and ineffective counsel.

STATEMENT OF FACTS

The defendant, Billy J. Price was initially represented by Earl Xais, a private attorney, who was hired by the defendant and in fact, conducted the preliminary examination on behalf of the defendant although Mr. Allen of the Public Defender Association was initially assigned to conduct defendant's preliminary hearing.

By virtue of defendant becoming non-bailable due to the State amending the information to an aggravated murder, a capital offense, the defendant appeared before the Honorable Ronald O. Hyde for arraignment on April 30, 1992 and entered pleas of not guilty to the two count information.

Appearing with the defendant at such hearing, was Attorney Stephen Laker, of the Public Defender Association, Inc. of Weber County who indicated in discussion with the court that he and Attorney Martin Gravis were co-counsel in this proceeding. (TR. April 30, 1992 Pg. 3)

The defendant's attorney Martin Gravis, who was also the Managing Associate of the Public Defender Association, Inc., subsequently filed a motion requesting the court proceed in camera with regard to defendant's application for expert and investigative assistance. (R.30-34)

The State of Utah, prior to the hearing requesting such assistance, filed an objection and cited the agreement between Weber County and the Public Defender Association which provided that attorneys hired by the Association did their own reasonable

investigating but could with prior approval of the County secure such payment by the county. (R.69-70). Defendant's motion came on for hearing on May 22, 1992 and on the issue of investigative services the following colloquy occurred:

> **MR. GRAVIS: Investigatory Services. Unless the -- it's extraordinary and the contract provides we go that the -- it wasn't well thought out, it provides that the -- if I need extra investigatory services, I go to my board of directors, and then if they approve. We come to the court and to the county commission. I feel after looking at that, if there is extraordinary investigatory services, that is not a proper way to do it, allowing the county to say whether or not--**
>
> **THE COURT: I don't think it's whether or not you do it, it's whether or not the pay you the extra for it.**
>
> **MR. GRAVIS: But I don't anticipate that's going to be a necessity in this case, but we can argue about it, but I don't anticipate that we're going to be asking for extra money for investigatory services so--**
>
> **THE COURT: Well then I guess you don't have a problem, do you?**
>
> **MR. GRAVIS: If that does, then we can argue about it later,... (TR. May 22, 1992, Pg. 10).**

Thereafter, on or about July 28, 1992, Attorney Gravis and Attorney Laker ceased representing the defendant when a conflict developed between them, and on August 3, 1992, Attorney John Caine appeared with the defendant and stated to the court as follows:

> **As your honor is aware, this is Mr. Price here beside me. Because of a conflict that arose with other members of the Public Defender staff, he has asked that I get in this case. (TR. August 3, 1992, Pg. 2)**

After further explanation by Attorney Caine of him having a relationship with some of the victim's family, which had been over many years of representing a number of them, and his continued association with some members of the victim's family, the following

colloquy with the court was held:

> **THE COURT: If you feel that relationship would in any way affect your representation of Mr. Price, that's the question.**
>
> **MR. CAINE: Believe me, I've been thinking about that for some time - - some time. It's hard - - it's hard to answer that. I've reviewed the facts of this case and I think I'm fairly conversant with what is alleged to have happened here and feel strongly about some aspects of it, and you'll see that as we go through.**
>
> **But I do have - - I have been friends with various members of the victim's family and I've also represented them and still consider myself to be friends with some of them. I know they're not going to be very happy about me being involved in this case, but don't think they get to pick either, so I'll continue to assess that. Right at the moment I do not think it would impact anything that I would do here. That is my view.**
>
> **THE COURT: Alright.**
>
> **MR. CAINE: And I have been over this extensively with Billy; is that right.**
>
> **MR. PRICE: Sure.**
>
> **MR. CAINE: And you and I have talked about this.**
>
> **THE COURT: How do you feel about it Mr. Price?**
>
> **MR. PRICE: I want him to be pretty professional about it for me to put my confidence in him.**
>
> **THE COURT: Do you want him to continue as your attorney, knowing what you know about this situation?**
>
> **MR. PRICE: If it is not going to cause any kind of a conflict of interest, sure. (TR. August 3, 1992 Pg. 3-4)**

On November 9, 1992, when a final Pre-trial hearing was scheduled, Attorney Caine indicated problems had arisen in his continued representation of the defendant. (TR. November 9, 1992 pg 2-5)

After which, the following discussion took place between the

court and the defendant:

> **MR. PRICE: Then give me an attorney out of this county where I don't have to fear them being so close to Mr. Caine and Ms. Knowlton.**
>
> **THE COURT: Why didn't you say this three or four months ago Mr. Price?**
>
> **MR. PRICE: Because I wanted to give this man a fair chance. I mean if - - if he's an attorney and if he wants to do the right thing then I won't stop that, and I won't prolong the court, like I said. But if he's not, who's to say what he is going to let this lady get away with. (TR. November 9, 1992 Pg. 12)**

The defendant reiterated at such hearing that he wanted somebody out of this county who would not be subject to influences with these people. (TR. November 9, 1992 Pg. 18)

In light of what was transpiring, Attorney Gravis, the Managing Associate of the Weber County Public Defender Association, Inc. and prior attorney for the defendant in this proceeding became involved in the discussion with the court. Attorney Gravis had previously withdrawn as defendant's attorney by virtue of a conflict with the defendant and himself. After the discussion between the Court and Attorney Gravis the issue of who would be representing the defendant was scheduled for further hearing on November 16, 1992. (TR. November 9, 1992 Pg 27-34).

During such hearing on November 9, 1992, the defendant had indicated to the Court in light of what had occurred he did not feel comfortable with "any of them up here" referring to the Public Defender Association of Weber County representing him.

After the defendant made such statement to the Court, Attorney Gravis requested to address the Court concerning the issue of who

would be representing the defendant and advised the court when he was acting as prior counsel for Mr. Price, he was told by Mr. Price that he was going to keep firing public defenders until the court appointed Ron Yengich to represent him. The only issue Attorney Gravis was disposed to address to the Court at that time was the issue of public defender money. (Tr. November 9, 1995 Pg. 27-28)

At the hearing of November 16, 1992, Attorney Gravis appeared and indicated that the only other three individuals within the Public Defender Association that could be considered, were Attorneys Allen, Laker and Froerer. (TR. November 16, 1992 Pg. 3 - 5)

The court, after some discussion, indicated that it would not be appropriate for Attorney Allen to represent the defendant since he was a partner with Mr. Caine. (November 16, 1992 TR. Pg. 5) Despite the court being informed that Attorney Laker had previously been involved as co-counsel with Attorney Gravis and having previously withdrawn when Attorney Caine assumed the representation of the defendant (TR. November 16, 1994 Pg. 6), the court advised the defendant he would be having attorneys Froerer and Laker sit down with him relative to their representation of him. (TR. November 16, 1992 Pg. 8)

The defendant, when asked what he thought about the situation indicated to the court as follows:

> **MR. PRICE: I still feel the same way I did last week about them sticking together though I mean**
>
> **THE COURT: I am ruling as a matter of law that these attorneys are not in anybody's pockets.**
>
> **MR. PRICE: I am not saying they are in anybody's pockets, but they are sure sticking together quite a bit.**

THE COURT: Well, the trouble Mr. Price, is that if the Public Defender believes that the law is a particular way and the County Attorney's Office also believes that the law is a particular way that doesn't mean that they are sticking together. What that may mean is that that's what the law is and if that is your concern, that is a valid concern from the standpoint of this case.

MR. PRICE: I would much rather be comfortable with counsel outside of the county.

THE COURT: No sir, that is not - - you're not entitled as a matter of law to that.

MR. PRICE: I understand. (TR. Nov. 16, 1992 Pg.9)

At the final hearing relating to appointment of counsel on November 19, 1992, the court appointed attorneys Laker and Froerer to represent the defendant, and again asked Mr. Price if he wished to be heard and the defendant stated as follows:

MR. PRICE: I don't want to aggravate you or upset you or anything like that, but I still feel..

THE COURT: It's okay, I have already got a headache, so it's alright.

MR. PRICE: I just want the court ..

THE COURT: Say what you feel Mr. Price.

MR. PRICE: I just want some experience. I mean I am sure Mr. Laker I told him he's a pretty good person, but for a case like this you have to have the experience.
(TR. November 19, 1992 Pg. 8)

During the same discussion between the court and the defendant, the following discourse also occurred:

THE COURT: Okay, let's set it for trial.

MR. PRICE: It's still going to cause a conflict of interest, and that is what I'm scared of right now.

THE COURT: Well now if the conflict of interest your concerned about is the relationship between the County Attorney's Office and the Public Defender's office, I am finding specifically that there is not a conflict of interest.

Now, is there some other conflict of interest you are concerned about?

MR. PRICE: There is a problem there. I mean, your the Judge, I can see it, surely you can see it. (November 19. 1992 TR. Pg.9-10)

After jury selection, the trial proceeded on March 4, 5, 8, and 9, 1993. At such trial, the State called as witnesses seven (7) police officers including dispatcher Mitchell; a criminalist; a medical examiner; three (3) witnesses to the shooting death of Kathryn Scott (Hairston, De Lavallade, and Kunua);and two (2) relatives of the decedent (Ross and Anderson).

Mr. De Lavallade, who was a neighbor of the decedent, testified that while not seeing the shooting he saw a black male standing over the body shouting and hollering all kinds of obscenities (Tr. Vol.7. Pg. 120)

Jesse Anderson, the decedent's grandmother, testified the defendant sounded angry earlier the night of the shooting when he was trying to contact her relative to visitation with his daughter (Tr. Vol.8 Pg. 70). She also testified the defendant was sneaky, although she didn't see him much because she wasn't around him much.

Additionally, she testified she had a conversation with him on one occasion where the defendant asked her to hit him because he had done something wrong to the decedent, Kathryn Scott, and despite the

decedent's request that Mrs. Anderson hit him, she wouldn't hit the defendant. (Tr. Vol. 8 Pg 72, 74).

Contrarily, the Defense called no witnesses and the entire defense portion of the case consisted of playing the 911 emergency tape, which had been discussed by police dispatcher Mitchell during the State's presentation of its case.

After conviction and sentence, at the request of the defendant, Attorney Laker on behalf of the Public Defender Association,Inc. filed a Notice of Appeal and submitted a brief on behalf of the defendant. Said brief was filed with the court on or about November 3, 1993.

The defendant, on or about November 5, 1993, filed a pro se motion for appointment of substitute counsel citing conflict of interest and ineffective counsel and in response thereto defendant's counsel, Stephen A. Laker on December 13, 1993, filed a Notice of Withdraw.

This matter was returned to the Second District Court for consideration of the defendant's motion for appointment of substitute counsel and Attorney Laker's Motion to Withdraw, which resulted in the appointment of private counsel unaffiliated with the Public Defender Association of Weber County, Inc. to assert defendant's claims of conflict of interest and ineffective counsel.

SUMMARY OF ARGUMENT

The defendant, Billy J. Price, asserts that he was denied effective counsel in violation of his Sixth Amendment constitutional rights. Such conflict of interest was raised and pronounced many

times to the District Court by the defendant and such conflict was of such a nature, that prejudice is presumed.

In the event this court determines that a conflict of interest does exist but prejudice is not presumed or that the conflict of interest was not properly raised by the defendant at the trial level, then the defendant asserts he was denied a fair trial in that he was compelled to accept as counsel individuals who acted in concert and not in his best interest.

Defendant also asserts the Public Defender Association was more concerned with Public Defender money than in defendant being afforded a proper and complete defense as evidenced by the failure of any of the five (5) Public Defender Association members to even request an investigator be appointed at county expense.

Such monetary concern, as opposed to the zealous representation of an attorney's client is also evidenced by the actions of Attorney Martin Gravis, Managing Associate of the Public Defender Association, who divulged statements made in confidence to him by the defendant while he was representing the defendant, when it appeared the Court may appoint someone other than a member of the local Public Defender Association to represent the defendant. (Tr. November 9, 1995 Pg 27-28)

ARGUMENT

I.

DID THE LOWER COURT'S FAILURE TO PERCEIVE THE CONFLICT OF INTEREST WHEN APPOINTING ATTORNEYS LAKER AND FROERER RESULT IN A DENIAL OF DEFENDANT RIGHT TO COUNSEL.

The Utah Court of Appeals in State v. Johnson, 823 P.2d 484

(Utah App. 1991) reiterated the importance of a defendant being afforded a fair trial by having the effective assistance of counsel and stated:

> **The Sixth Amendment to the United States Constitution states: In all criminal prosecutions the defendant shall enjoy the right ... to have the assistance of counsel for his defense. This right guarantees all criminal defendants the right to effective counsel, Templin, 805 P.2d at 186, and "includes the right to counsel, free from conflict of interest" State v. Webb, 466 U.S. at 688, 104 S.Ct at 2065). State v. Johnson, 823 P.2d 484 (Utah App. 1991)**

State v. Johnson, cited supra, also addressed the issue of conflict of interest and its being a special subtype of an ineffectiveness claim and held where a defendant prevails in his showing that an actual conflict of interest existed which adversely affected his lawyer's performance, prejudice will be presumed by the court.

Pursuant to Rule 1.10 Imputed Disqualification: General Rule. of the Rules of Professional Conduct there appears a definition of "firm":

> **For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules.**

The defendant asserts that the Public Defender Association, Inc., of Weber County, is a firm as defined by the rules and as such the imputed disqualification should apply in this case.

The Utah Court of Appeals, in State v. Johnson, cited supra, in addressing the prior Canon Nine of the former Canons of Professional Responsibility held as follows:

> **First, the court must find that there is "at least a reasonable possibility that some specifically identifiable impropriety" occurred because of the representation. Id. (quoting Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976) There need not be proof of actual wrongdoing, however. Id. at 829. Second, the court must balance "the likelihood of public suspicion or obloquy" against the social interest in allowing the defendant to continue being represented by the lawyer of his or her choice. Hobson, 673 F.2d at 828 (quoting Woods, 537 F.2d at 813 n. 12).**

The defendant conceded to the trial court he didn't have the right to select private counsel but asked the court to appoint an attorney from another county only after the inherent, if not outwardly visible, conflicts of interest developed.

Not only was the Public Defender Association, Inc. Of Weber County an association or "firm" consisting of only five (5) members (Attorneys' Gravis, Laker, Caine, Allen, and Froerer), one of the members, Attorney Caine, had a special and ongoing relationship with a number of the decedent's relatives which ultimately resulted in Attorney Caine's inability to represent the defendant.

After such disqualification arose,in light of the other conflicts that had previously arisen between other members of the Public Defender Association and the defendant, the court should have been aware of the conflict and appointed non-affiliated counsel.

The court as well as the Public Defender Association should have been cognizant of the inherent hesitation of the defendant to fully confide in members of the Public Defender Association where

one of their members had an ongoing relationship with the victim's family members and then further compounded the problem by reappointing Attorney Laker, who was previously co-counsel with Attorney Gravis, to represent the defendant

The Court, in State v. Johnson, cited supra, declared the right to effective assistance of counsel is so basic to a fair trial that its infraction can never be treated as harmless error and that a Sixth Amendment claim grounded on conflict of interest is a special type of ineffectiveness claim and must be analyzed under a standard different from that used for other ineffective assistance of counsel claims:

> **A defendant who did not object to the conflict at trial, has the burden on appeal of demonstrating with specificity that "an actual conflict of interest existed when adversely affected his [or her] lawyer's performance. Webb, 790 P.2d at 73(quoting Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718 (1980); Zepp, 748 F.2d at 135-36,(citing Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103 (1981)). If the defendant makes such a showing, prejudice need not be demonstrated to prevail on the claim. Cuyler, 446 U.S. at 349-50 100 S.Ct. at 1718-19; Webb, 790 P.2d at 73. The court will presume the defendant was prejudiced by the lawyer's performance. United States v. Cronic, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, (1984); Webb, 790 P.2d at 73 (quoting Strickland, 466 U.S. at 692, 104 S.Ct. at 2067)**

In the instant proceeding, the defendant did object claiming a conflict of interest on numerous occasions to the court and the following discourse on November 9, 1992 fortifies defendant's conflict claim:

> **MR. PRICE: I don't feel comfortable with any of them up here though, I honestly don't.**
>
> **THE COURT: You don't get to choose your attorney.**
>
> **MR. PRICE: I understand I don't, but - -**

THE COURT: And you don't even know who we are talking about, yet your not comfortable with them.

MR. GRAVIS: Your honor, may I address the court?

THE COURT: Yes you may.

MR. GRAVIS As you know, I was prior counsel for Mr. Price. I do have some concerns about this. Mr. Price has indicated to me in the past that he was going to keep firing Public Defenders and he thought that he could get the court to appoint Ron Yengich to represent him.

THE COURT: He's not going to get the appointment of anybody.

MR. GRAVIS: And as managing attorney of the Public Defender's office, as I say, we don't have a contract with anybody else and I do have some concerns if he, again, moves to fire any Public Defender. At that point, we don't have anybody left to represent him.

MR. PRICE: See, this is what I'm talking about. I don't mean - -

THE COURT: That's what he is talking about too, Mr. Price.

MR. PRICE: See, I don't need that influence. Now, all of these people sir, are good friends. They have been working together for years and I am sure that they have handled many cases.

MR. GRAVIS: That is my concern as managing attorney, that if we get an attorney outside the Public Defender's office, public defenders does not have the money to obtain private counsel for Mr. Price.

THE COURT: Well of course I guess that is a public expense and if we have . .

MR. GRAVIS: Well that's not necessary so, the only way.

THE COURT: I understand.

MR. GRAVIS: There would have to be hearing and in order for the county....(November 9, 1992. TR. Pg. 27 - 28)

This discourse between the court, Attorney Gravis as Managing Associate of the Public Defender Association of Weber County and prior attorney for the defendant illustrates the defendant's concern about members of the Public Defender Association representing him when it is apparent that the interest of the Public Defender Association is monetary and has nothing to do with defendant being effectively represented.

II.

THE PUBLIC DEFENDER ASSOCIATION ATTORNEYS FAILED TO PROVIDE DEFENDANT WITH UNDIVIDED LOYALTY AND AN EFFECTIVE DEFENSE RESULTING IN A DENIAL OF HIS RIGHT TO A FAIR TRIAL AND RIGHT TO COUNSEL

Defendant asserts as the Utah Supreme Court held in State v. Brown, 853 P.2d 851 (Utah, 1992) this is the same type of inherent conflict of interest which requires reversal for the defendant's right to the undivided loyalty of counsel was jeopardized by the actions of one of the members the Public Defender Association.

The conduct of Attorney Gravis, of the Public Defender Association, in divulging confidential statements made to him by the defendant when monetary considerations became an issue, constituted a violation of the attorney-client privilege and created a situation breeding individual as well as public mistrust and the per se rule of reversal should apply when a conflict of interest manifests itself so blatantly.

In State v. Brown, cited supra, the Utah Supreme Court was very mindful of public confidence in the criminal justice system and

insuring the public's faith in the impartiality and integrity of the justice system and the appearance of fairness and impartiality in the adjudication process must be diligently maintained.

The Supreme Court in State v. Brown also stressed the importance of undivided loyalty due an indigent defendant and recognized the difficulties in determining what sort of unconscious influences may affect such advocacy. Certainly, the monetary concerns of the Public Defender Association of Weber County taking priority over zealous representation of the defendant resulting in a violation of the attorney-client privilege and ignoring any consideration of conflict of interest is indicative of the lack of the undivided loyalty due but not afforded this defendant. The Public Defender Association, Inc. either through oversight, budgetary constraints or because of the numerous changes of attorneys assigned to this proceeding ignored the need for an investigator which the defendant needed in preparing and presenting a full and unfettered defense, especially since he was incarcerated awaiting trial and could not seek out witnesses or facts in his own defense.

Attorneys Laker and Froerer, who conducted the actual trial defense of the defendant, were members of the same Association as Attorneys Caine and Gravis and not one of them sought or perceived the need for making request of the county for costs in hiring an investigator, despite a central issue in this capital homicide proceeding being prior conduct between the decedent and the defendant. In fact, a prior assaultive incident involving the

decedent and the defendant was testified to and received by the court (TR. Vol, 8 Pg.59-61).

The defendant, whose entire defense presentation consisted of playing the 911 emergency recording to the jury (TR. Vol.9 Pg.8-9) was incarcerated awaiting trial and unable to seek out any witnesses to his relationship with the decedent and his theory of the case.

The defendant's attorneys advanced the proposition in their opening statement that there was a great deal of animosity between the decedent's family and the defendant, even instances where the defendant had been threatened by them. There was also discussion in defendant's opening statement of defendant's anger and frustration in his relationship with the decedent.(TR. Vol 7. Pg 61-71)

The prosecution requested the court address the issue of the State presenting to the jury, facts surrounding such relationship after such opening statement and the court inquired of defense counsel if they were going to present evidence concerning such issue. Attorneys Laker and Froerer indicated to the court that the defense was hoping to present evidence on such matter to the jury but didn't know if they could. (Tr.Vol.8 Pg 4-5)

Without securing witnesses or presenting testimony to establish the mental state of the defendant from such prior relationship of the defendant to the decedent, there was little, if any, evidence available for the jury to consider the lesser included offense of manslaughter, based upon a showing of "extreme emotional disturbance for which there is a reasonable explanation or excuse". The failure

of defendant's counsel leads directly to the conclusion that the claim of defendant that he was not effectively represented is well founded.

CONCLUSION

Based upon the above and foregoing arguments the defendant, BILLY JOE PRICE ,requests this court grant defendant a new trial.

RESPECTFULLY SUBMITTED this 18 day of April, 1995.

RONALD W. PERKINS
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Motion to State of Utah, Office of Attorney General, THOMAS B. BRUNKER, 236 State Capitol, Salt lake City, Utah 84111 on this 18 day of April, 1995.

RONALD W. PERKINS

Appendix "A"

Public Defender Contract

AGREEMENT FOR INDIGENT
CRIMINAL LEGAL SERVICES

THIS AGREEMENT dated as of the 1 day of January, 1990, entered into by and between WEBER COUNTY CORPORATION, Utah (the "County"), a political subdivision and body politic under the laws of the State of Utah, and THE PUBLIC DEFENDER ASSOCIATION OF WEBER COUNTY, INC. (the "Association"), a non-profit corporation duly organized, existing and in good standing under the laws of the State of Utah.

W I T N E S S E T H :

WHEREAS, the COUNTY, pursuant to Chapter 32 of Title 77, Utah Code Annotated, is required to furnish legal defense for indigent persons charged in Weber County in criminal cases in the courts and various administrative bodies of the State of Utah; and

WHEREAS, the ASSOCIATION is a non-profit corporation duly organized and existing under the laws of the State of Utah for the purpose of providing legal services in criminal cases to indigent persons pursuant to Utah Code Annotated Section 77-32-6(a); and

WHEREAS, the COUNTY and ASSOCIATION are mutually desirous to enter into an agreement to provide criminal legal services to indigent persons;

NOW, THEREFORE, for and in consideration of the mutual promises and covenants herein contained, the parties hereto agree as follows:

Section I

Term

A. Commencement. This contract shall commence on January 1, 1990. The original term of the contract shall be four years. After the original term, this contract shall continue on a continuing four year term basis unless canceled by either the COUNTY or the ASSOCIATION prior to the beginning of any four year term.

B. Termination of the Agreement. This Agreement may be canceled by either party after the original term by sending written notice of cancellation to the other party at least three months prior to the end of the calendar year.

Section II

Payment

The COUNTY agrees to pay the ASSOCIATION for legal and investigative services as follows:

A. Amount. A base amount of $164,000 for the calendar year of 1990. Each year thereafter, any adjustment shall be made according to the average percentage increase granted to merit employees of the COUNTY. The average percentage increase in the salaries of the merit employees of the COUNTY shall be similarly added to the base amount of this contract. The base amount will be adjusted annually during the COUNTY's budget process. The first adjustment shall be included in the 1991 COUNTY budget, adding to

the base all appropriate increases granted to COUNTY merit employees during the 1990 calendar year. If the criminal cases filed by the COUNTY increases twenty percent (20%) or more over the County Attorney's case load in 1989, the parties shall renegotiate the base amount of the contract.

B. Payment Schedule. Payments from the COUNTY to the ASSOCIATION shall be made in twelve (12) equal installments paid the first of each month.

C. Additional Compensation - Appeals. The ASSOCIATION shall be responsible to file, brief and argue, if required, without additional compensation the first fifteen (15) appeals before any appropriate state court during any calendar year. The ASSOCIATION shall be paid at a rate of $500 for each additional appeal above fifteen (15) filed in any calendar year as required in Section III. A. below. To receive compensation, an appeal brief must be filed with the Utah Court of Appeals or the Utah Supreme Court. Mere notice of appeal without further action will not qualify for additional compensation. Any federal appellate court appearance required to be made by the ASSOCIATION shall require additional compensation, which shall be negotiated by the parties.

Section III

Services Provided by the ASSOCIATION

A. Legal Services. The ASSOCIATION shall provide qualified legal counsel. All attorneys providing services shall be members of the Utah State Bar in good standing.

The ASSOCIATION shall provide legal counsel for any indigent adult eighteen (18) years or older, or any juvenile certified by the Juvenile Court to stand trial as an adult, or any juvenile who is charged as an adult with a criminal offense by the State of Utah in Weber County. Such representation shall be as required by Chapter 32 of Title 77 of Utah Code Annotated or any successor statute or court decision regarding indigent criminal defense.

The ASSOCIATION shall also be responsible annually for all indigent criminal appeals, criminal writs, and other criminal proceedings for which the COUNTY is responsible for providing defense pursuant to Chapter 32, Title 77, or other provisions of the law brought before the courts of the State of Utah or courts of the United States and originating in Weber County.

B. Staff. The ASSOCIATION shall provide an adequate number of attorneys to act as defense counsel.

The attorneys hired by the ASSOCIATION shall do their own reasonable investigating. The ASSOCIATION shall provide other facilities (secretarial staff) as necessary to provide

support for the attorneys. Cost of all hired investigators (with prior approval by the Chairman of the ASSOCIATION, the County Commission member of the ASSOCIATION, and the appropriate court) shall be paid by the COUNTY.

C. Other Expenses. The ASSOCIATION shall be solely responsible for all office expenses relating to the ASSOCIATION.

Section IV

Location of ASSOCIATION

The ASSOCIATION shall maintain an office to conduct their business. The current location is 2568 Washington Boulevard, Ogden, Utah 84401. The ASSOCIATION shall notify the COUNTY in writing of any change of address at least two (2) weeks before any move.

Section V

Independent Contractor Status

The ASSOCIATION is an independent contractor with the COUNTY. The ASSOCIATION shall be solely responsible for all appropriate social security, workman's compensation, and pension plans as required by law. It is understood and agreed that none of the individuals hired or contracted by the ASSOCIATION are employees of the COUNTY.

Section VI

Conflicts of Interest

The ASSOCIATION and the COUNTY recognize that in previous years problems have arisen in the area of conflicts of interest. To help alleviate the problems, the ASSOCIATION shall contract with at least three law firms and/or individual practitioners not associated in fact. The ASSOCIATION shall continue to use its best efforts to maintain a staff of independent attorneys who are independent from each other.

The appointment of counsel outside the ASSOCIATION shall only occur when the court determines that all the attorneys contracted with the ASSOCIATION have a conflict of interest with a defendant.

Upon a ruling by the court that all the attorneys contracted with the ASSOCIATION have a conflict of interest in representation of a particular defendant, the COUNTY shall be responsible to contract with outside legal counsel for a defendant. The ASSOCIATION shall not be liable for any legal costs of defending such an individual.

Section VII

Qualification for Indigent Representation

A. Affidavit of Impecuniosity. The ASSOCIATION's attorneys shall interview any defendant requesting a public defender to determine if the individual qualifies. If the

individual qualifies, the attorney shall prepare an affidavit listing all assets and income of the individual. The affidavit's form shall be approved by the County Attorney, the Judges of Weber County, and the ASSOCIATION. The ASSOCIATION shall notify the appropriate court when an individual who has previously qualified for indigent legal counsel is no longer eligible for those services.

B. Private Criminal Clients. The attorneys contracting with the ASSOCIATION shall not be prohibited from maintaining a private criminal practice. The ASSOCIATION's attorneys shall not represent, in the referred criminal case, individuals referred to the attorney for screening regarding indigency qualifications who subsequently do not qualify for such representation. This shall not prohibit another attorney contracted by the ASSOCIATION from being retained by a non-qualifying individual as long as there is no referral from any other attorney in the ASSOCIATION, and the contact is made independent from any ASSOCIATION referral.

C. Referrals of Non-Qualifying Individuals. A referral service shall be established by the ASSOCIATION's contracted attorneys. The contracted attorneys shall provide to a non-qualifying individual a list of other private legal counsel. No attorney contracting with the ASSOCIATION shall be placed on the list. Any qualified attorney who requests shall be placed on the ASSOCIATION's referral list.

D. Recoupment of Attorney Fees. The ASSOCIATION, through its attorneys and the County Attorney, shall work together to urge the courts to adopt a system of imposing attorney's fees on convicted defendants pursuant to section 77-32a-2, Utah Code Annotated.

Section VIII

County Commission Membership on the ASSOCIATION Board

The Board of County Commissioners shall designate in writing to the ASSOCIATION one of its members to be a representative on the Board of Trustees of the ASSOCIATION. The Commissioners' representative shall be a fully participating trustee.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

WEBER COUNTY CORPORATION

By: William A. Bailey
William A. Bailey, Chair

THE WEBER COUNTY PUBLIC
DEFENDER ASSOCIATION, INC.

By: Morris Sterrett
Morris Sterrett, Chair

Appendix "B"

United States Constitution
Sixth Amendment

AMENDMENTS
TO THE
CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The first ten Amendments were proposed by the first Congress and were ratified as follows: New Jersey, Nov. 20, 1789; Maryland, Dec. 19, 1789; North Carolina, Dec. 22, 1789; South Carolina, Jan. 19, 1790; New Hampshire, Jan. 25, 1790; Delaware, Jan. 28, 1790; Pennsylvania, Mar. 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, Nov. 3, 1791; Virginia, Dec. 15, 1791. Connecticut, Georgia and Massachusetts ratified them on April 19, 1939, March 18, 1939 and March 2, 1939, respectively.

AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

History: Proposed by Congress on September 5, 1794; declared to have been ratified by the legislatures of three-fourths of all the states on January 8, 1798.

AMENDMENT XII

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an

inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

History: Proposed by Congress on December 12, 1803; declared to have been ratified by the legislatures of three-fourths of the states on September 25, 1804.

AMENDMENT XIII

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

History: Proposed by Congress on February 1, 1865; declared to have been ratified by the legislatures of twenty-seven of the thirty-six states on December 18, 1865.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix "C"

Rules of Professional Conduct Rule 1.10

plinary process The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation and the severity of a sanction depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations Disciplinary action shall be governed by the Procedures of Discipline of the Utah State Bar, and the burden of proof shall be on the State Bar to sustain any allegation of violation by clear and convincing evidence

Violation of a Rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies They are not designed to be a basis for civil liability Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons The fact that a Rule is a just basis for a lawyer's self-assessment or for sanctioning a lawyer under the administration of a disciplinary authority does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule Accordingly, nothing in the Rule should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty

Moreover, these Rules are not intended to govern or affect judicial application of either the client-lawyer or work product privilege Those privileges were developed to promote compliance with law and fairness in litigation In reliance on the client-lawyer privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure The client-lawyer privilege is that of the client and not of the lawyer The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with the recognized exceptions to the client-lawyer and work product privileges

The lawyer's exercise of discretion not to disclose information under Rule 1 6 should not be subject to reexamination Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule The Preamble and this note on Scope provide general orientation The Comments are intended as guides to interpretation, but the text of each Rule is authoritative Research notes were prepared to compare counterparts in the Code of Professional Responsibility (approved by the Utah Supreme Court February 19 1971) and to provide selected references to other authorities The notes have not been adopted, do not constitute part of the Rules and are not intended to affect the application or interpretation of the Rules and Comments

TERMINOLOGY

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true A person's belief may be inferred from circumstances

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question

"Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization See Comment, Rule 1 10

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information

"Knowingly," "known" or "knows" denotes actual knowledge of the fact in question A person's knowledge may be inferred from circumstances

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation

"Reasonable" or "reasonably,' when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable

"Reasonably should know, when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question

'Substantial,' when used in reference to degree or extent, denotes a material matter of clear and weighty importance

Client-Lawyer Relationship

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation

Rule 1.2. Scope of Representation.

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation subject to paragraphs (b) (c) (d) and shall consult with the client as to the means by which they are to be pursued A lawyer shall abide by a client s decision whether to accept an offer of settlement of a matter In a criminal case, a lawyer shall abide by the client s decision after consultation with the lawyer as to a plea to be entered, whether to waive jury trial and whether the client will testify

(b) A lawyer may limit the objectives of the representation if the client consents after consultation

(c) A lawyer shall not counsel a client to engage or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity scope meaning or application of the law

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer s conduct

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client

Rule 1.4. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation

Rule 1.5. Fees.

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee Factors to be considered as guides in determining the reasonableness of a fee include the following

(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly,

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer,

(3) The fee customarily charged in the locality for similar legal services,

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances

(6) The nature and length of the professional relationship with the client,

(7) The experience, reputation and ability of the lawyer or lawyers performing the services and

(8) Whether the fee is fixed or contingent

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery showing the remittance to the client and the method of its determination

(d) A lawyer shall not enter into an arrangement for, charge or collect

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, or

(2) A contingent fee for representing a defendant in a criminal case

(e) A division of fee between lawyers who are not in the same firm may be made only if

(1) The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation,

(2) The client is advised of and does not object to the participation of all lawyers involved, and

(3) The total fee is reasonable.

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure

(b) A lawyer may reveal such information to the extent the lawyer believes necessary

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another,

(2) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used,

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or

(4) To comply with the Rules of Professional Conduct or other law

(c) Representation of a client includes counseling a lawyer(s) about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on the Lawyers Helping Lawyers Committee (Amended effective October 10, 1990.)

Rule 1.7. Conflict of Interest: General Rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and

(2) Each client consents after consultation

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest unless

(1) The lawyer reasonably believes the representation will not be adversely affected, and

(2) Each client consents after consultation When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation to each client of the implications of the common representation and the advantages and risks involved

(c) A lawyer shall not simultaneously represent the interests of adverse parties in separate matters unless

(1) The lawyer reasonably believes the representation of each will not be adversely affected, and

(2) Each client consents after consultation

Rule 1.8. Conflict of Interest: Prohibited Transactions.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership possessory, security or other pecuniary interest adverse to a client unless

(1) The transaction and terms on which the lawyer acquires the interest are fair and reason-

able to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client, and

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction, and

(3) The client consents in writing thereto

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or an account based in substantial part on information relating to the representation

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except

(1) A lawyer may advance court costs and expenses of litigation the repayment of which may be contingent on the outcome of the matter, and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless

(1) The client consents after consultation

(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and

(3) Information relating to representation of a client is protected as required by Rule 1.6

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client except that the lawyer may

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses, and

(2) Contract with a client for a reasonable contingent fee in a civil case

Rule 1.9. Conflict of Interest: Former Client.

A lawyer who has formerly represented a client in a matter shall not thereafter

(a) Represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation, or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known

Rule 1.10. Imputed Disqualification: General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially factually related matter in which that lawyer, or a firm with which the lawyer has associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless

(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client, and

(2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7

Rule 1.11. Successive Government and Private Employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person, unless the appropriate government client consents after consultation with the lawyer. A firm with which that lawyer is associ-